

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Petition for Rulemaking or,)	
Alternatively, a Waiver of the)	RM-11019
Eligibility Restrictions on C Block)	
Licenses in the Broadband Personal)	
Communications Services)	

REPLY COMMENTS OF COUNCIL TREE COMMUNICATIONS, INC.

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Council Tree Communications, Inc. (“Council Tree”), hereby submits its reply comments in response to the “Petition for Rulemaking, or, Alternatively, a Waiver of the Eligibility Restrictions on C Block Licenses in the Broadband Personal Communications Services” filed by CTIA on July 8, 2004 (“CTIA Petition”) in response to the rulemaking notice issued by the Consumer & Governmental Affairs Bureau. 1/

Introduction and Summary. As set forth below, none of the commenting parties establish a need to initiate a rulemaking proceeding, nor has any shown that a waiver of the current designated entity (“DE”) rules, including the entrepreneurs’ block closed bidding, is warranted. In fact, consistent with filings submitted in response to the *Auction No. 58 Public Notice*, 2/ the vast majority of

1/ Consumer & Governmental Affairs Bureau Reference Information Center Petition For Rulemaking Filed, *Public Notice*, Report No. 2663 (rel. July 15, 2004).

2/ Broadband PCS Spectrum Auction Scheduled for January 12, 2005, Comment Sought on Reserve Prices Or Minimum Opening Bids And Other Auction Procedures, *Public Notice*, ___ FCC Rcd ___, DA 04-1639 (rel. June 18, 2004).

parties agree with the Commission's policy rationale from Auction No. 35. Because Council Tree's previous filings thoroughly explain the importance of maintaining the current rules and address most of the arguments raised by the few commenters favoring the CTIA Petition, Council Tree will limit the instant reply comments to a discussion of four discrete issues.

First, T-Mobile's arguments add nothing new to the debate. Second, the petition for reconsideration of the *Auction No. 58 Public Notice* submitted by Verizon Wireless is procedurally defective, and therefore must be dismissed. Third, with respect to the comments submitted by the Rural Cellular Association ("RCA"), Council Tree observes that RCA does not expressly seek the elimination of closed bidding and, like CTIA, T-Mobile and Verizon Wireless, fails to make a case for the initiation of a rulemaking proceeding. To the extent that RCA is concerned about the ability of certain entities to receive DE status (and the resulting entrepreneur bidding eligibility), RCA ought to join the Rural Telecommunications Group ("RTG") and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") in supporting Council Tree's call for the implementation of a simple and easily applied personal net worth limitation. Finally, Council Tree notes that the overwhelming number of parties, representing a breadth of interests, have again urged the Commission to maintain the current DE rules for Auction No. 58.

Council Tree notes that these filings are posted to the Commission's website at: <http://wireless.fcc.gov/auctions/58/releases.html#da041639com>.

I. T-MOBILE'S ARGUMENTS ADD NOTHING NEW TO THE DEBATE

At their best, T-Mobile's comments reveal a severe case of amnesia regarding the history of Section 309(j) and the Commission's DE program. Although, as T-Mobile suggests, Section 309(j) and the Commission's DE rules were intended, in part, to promote competition, 3/ the promotion of competition was not the only goal sought by Congress and the Commission. An equally important goal was the promotion of economic opportunity and the dissemination of spectrum licenses to small businesses, including new entrants and businesses owned by minorities and women. 4/ As the Commission and Council Tree have previously indicated, small businesses and new entrants cannot enjoy meaningful access to broadband PCS spectrum in the absence of a set-aside specifically for them. 5/

Consumers will benefit from additional entry into the broadband PCS marketplace. In addition to ignoring important goals of Section 309(j) and the Commission's DE program, T-Mobile claims that maintaining the entrepreneurs' block for Auction No. 58 will not assist in promoting the Commission's competitive goals. In essence, T-Mobile is arguing that, at this point in time, consumers are not likely to benefit from additional entry into broadband PCS. 6/ A key tenet of T-

3/ See T-Mobile at 4.

4/ Implementation of Section 309(j) of the Communications Act-Competitive Bidding, *Fifth Memorandum Opinion & Order*, 10 FCC Rcd 403 (1994) ("*Competitive Bidding Fifth Memorandum Opinion & Order*") at 414-15 ¶16; see also Council Tree at 6-9.

5/ Council Tree at 8.

6/ T-Mobile at 4-6.

Mobile's position is that the larger carriers are already providing consumers with *all* of the services they desire ("consumers have demonstrated a clear demand for national wireless services, as opposed to niche or local services")^{7/} at prices and quality levels that would make consumers hostile or indifferent to the offerings of new entrants. ^{8/}

These oligopolistic-sounding assertions have no basis in reality. DEs such as Leap Wireless, Metro PCS and NTCH (d/b/a as ClearTalk), by offering services such as unlimited local calling, have already satisfied a significant need that was not being met previously by the larger mobile carriers. DEs have also been instrumental in ensuring that competitive pricing exists with respect to mobile service offerings. Council Tree expects similar innovative and consumer-friendly offerings, as well as valuable broadband services, to be provided by successful Auction No. 58 DEs. The fact that a national carrier may fail to see the opportunities available to provide niche, local and regional services makes it all the more important for the Commission to ensure that companies with a uniquely entrepreneurial vision have meaningful opportunities to access broadband PCS spectrum. Moreover, to the extent that their customers desire national wireless services, successful Auction No. 58 DEs will enjoy the same ability as other

^{7/} T-Mobile at 6.

^{8/} In fact, T-Mobile states that "[t]he use of closed auctions does not stimulate competition in mobile services, because it does not facilitate competition among the national and super-regional players." *Id.*

providers to enter into roaming, resale and related arrangements to facilitate provision of such services.

T-Mobile's arguments against new entry sound eerily like arguments made by the national air carriers against the granting of landing rights to small and regional air carriers. If such advice had been heeded by airline regulators, low-cost air carriers like Southwest, Jet Blue, Frontier and AirTran would not be providing service today. Thankfully, such anti-competitive arguments have not been embraced by government airline regulators, and they should not be embraced here.

Small businesses provide significant public interest benefits and DEs have a solid history of offering innovative services. Council Tree also disagrees with T-Mobile's contention that closed bidding auctions have resulted in huge societal costs in terms of lost service and underutilized spectrum, 9/ and that the Commission's entrepreneurs' block provision has been "a significant contributing factor" to such failures. 10/ First, closed bidding has allowed many companies that would otherwise not have been able to acquire broadband PCS spectrum the ability to secure a foothold in the wireless marketplace. A sampling of the many DEs that have built out and successfully launched services includes companies such as Leap Wireless, Metro PCS, Telecorp, Tritel, T-Mobile predecessors Omnipoint and Cook Inlet, and many others that have offered valuable services to the public and contributed greatly to the growing popularity of broadband PCS. Second, the

9/ T-Mobile at 10.

10/ T-Mobile at 11.

“failures” that occurred with respect to some closed licenses had nothing to do with the requirement of closed bidding, but were instead plainly and solely due to the Commission’s now defunct low-interest installment financing regime. T-Mobile’s arguments to the contrary are unpersuasive.

T-Mobile also states that “[DE] eligibility restrictions trade real gains in efficiency and competition that would directly benefit consumers for an illusory public benefit that experience has shown.” 11/ Council Tree asserts that the public benefits of small business set-asides, as embodied by the contributions of the companies listed above, include provision of services and competition in rural markets, higher quality service offerings, innovative new consumer rate plans, lower priced rate plans and a deeper commitment to meeting the needs of local customers. Nothing about these public benefits is illusory. Like millions of other small businesses and new entrants in other industries across the United States, small businesses and new entrants in wireless deliver these benefits every day. In fact, the vigor with which T-Mobile and other large mobile carriers are opposing the Commission’s modest Auction No. 58 incentives suggests that the benefits are indeed extremely significant.

T-Mobile’s own experience bears witness to the success of the Commission’s DE program. Ironically, a very substantial portion of the spectrum T-Mobile currently uses was secured in DE-only or closed auctions. Former auction winners such as Omnipoint and Cook Inlet, which have since merged into T-Mobile, originally

11/ T-Mobile at 10.

secured very successful footholds in the wireless market through the C-block auction. These companies built out operating footprints that became absolutely central to T-Mobile's emergence as a national carrier – indeed the fifth largest today.

As a related matter, it is also highly interesting to note that the A and B block PCS auctions, which represented the other critical source of T-Mobile's spectrum licenses through its predecessor companies (VoiceStream, Aerial and Powertel), were off limits to incumbent cellular carriers in the markets in which they operated. In essence, the A and B block licenses were “set-aside” for new entrants, a fact to which T-Mobile owes its success today. 12/

Unlicensed spectrum and spectrum leasing are inadequate substitutes for broadband PCS licenses. T-Mobile's suggestion that the Commission's unlicensed spectrum and leasing policies make it unnecessary to create meaningful opportunities for small businesses and new entrants to become broadband PCS licensees is also flawed. 13/ Comparing broadband PCS spectrum to unlicensed spectrum, for example, is like comparing expensive beach front property to uninhabitable swamp land as starting points for a real estate developer seeking to undertake a new development. Although it might be possible to cobble together a minor niche business out of available unlicensed spectrum, a retail-oriented business with the scale and opportunity of broadband PCS is simply not possible

12/ T-Mobile is not the only large mobile carrier that has benefited from closed auctions. Sprint PCS also secured most of its broadband PCS spectrum in an auction that was off-limits to cellular incumbents.

13/ T-Mobile at 8-10.

without sizable amounts of spectrum – spectrum that is interference-free, has favorable propagation characteristics, is readily accessible through a broad range of equipment developed by a broad range of manufacturers and is already serving a broad base of customers.

Moreover, the dearth of spectrum leasing, partitioning and disaggregation activity to date underscores the relative futility of attempting to secure spectrum from the large mobile carriers through these means. 14/ The fact is that incumbents have little or no incentive to lease spectrum to a new entrant when they can alternatively warehouse the spectrum and diminish competition. New entrants therefore require ownership of, and control over, the life-blood of their businesses, namely spectrum licenses.

Bidding credits alone are inadequate for DE participants to obtain meaningful amounts of broadband PCS spectrum. Council Tree also disagrees with T-Mobile's suggestion that because nearly 80 percent of winning bidders in open auctions have been qualifying small businesses, small businesses would be able to secure a significant number of broadband PCS licenses in an open auction. 15/ As Council Tree has previously indicated, broadband PCS spectrum is qualitatively different from the spectrum sold in most of the auctions covered by T-Mobile's analysis. Broadband PCS licenses are highly valuable, while the vast majority of other licenses auctioned have very little value. Allowing small businesses to win

14/ See BloostonLaw at 3.

15/ T-Mobile at 8-9.

numerous licenses of little or dubious value does not provide the kind of access to opportunity that “beach front” broadband PCS licenses provide. It is therefore misleading to predicate small business success on the number of licenses won, when it is really dependent upon the number of *quality* licenses won, namely those broadband PCS licenses that allow small businesses and new entrants to build meaningful wireless companies.

Council Tree’s own analysis provides a more accurate portrayal, focusing specifically on the value of licenses won, as opposed to the number of licenses won. That analysis shows that: (1) 82 percent of all DE auction winnings come from closed auctions, namely the five broadband PCS auctions that were closed, and (2) DEs fare poorly with bidding credits alone when competing against deep-pocketed incumbent carriers. ^{16/} The fact that broadband PCS spectrum is qualitatively different from the vast majority of spectrum that small businesses have successfully acquired through open Commission auctions does not excuse the Commission from its Section 309(j) obligation to “promot[e] economic opportunity and competition and . . . disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” ^{17/} In fact, because of the special nature of broadband PCS spectrum, which the Commission itself has acknowledged, closed

^{16/} Council Tree at 13-14 and Attachment 1.

^{17/} 47 U.S.C. § 309(j)(3)(B).

bidding is necessary to ensure the achievement of the Commission's Section 309(j) mandate.

Overbidding is unlikely to occur in Auction No. 58. T-Mobile also states that DEs have historically overbid in closed auctions “because of the lack of fully informed bidders who can signal to DEs the true value of the spectrum.” ^{18/} The truth is that although some overbidding occurred, it was limited to the original C block licenses and was caused entirely by the Commission's well-intentioned but in hindsight flawed decision to offer low-interest government installment financing, which is no longer available. ^{19/} Second, the proposition that overbidding will occur based on a lack of understanding of license values ignores the wealth of public market trading comparables and transaction comparables that allow bidders to accurately assess license values today – to say nothing of the perspective on values resulting from business plan discounted cash flow analyses. Third, investors in DEs are able to exert sufficient governance influence over management to ensure that appropriate bids are placed, just as DE bidders in Auction No. 35 amply demonstrated.

DE license applications are not unduly delayed. T-Mobile also suggests that maintaining entrepreneurs' block bidding will inevitably delay DE licensing and, as a result, delay the deployment of DE networks and services. Council Tree disagrees. At the outset, we note that DEs must describe on their long-form applications how

^{18/} T-Mobile at 11.

^{19/} See also NTCH, Inc. (“NTCH”) at 1.

they satisfy the DE eligibility requirements, whether they participate in closed bidding or in open bidding. 20/ Thus, the Commission has an obligation to examine a DE's qualifications in either case.

Second, although delays have occurred in DE licensing in the past, most such delays were attributable to the lack of available precedent on the application of the Commission's "controlling interest" standard. Now that a significant body of precedent exists, the Commission's processing of DE license applications has become easier and more streamlined.

Third, T-Mobile implies that the larger carriers always take immediate steps to provide service once they have been licensed. There are certainly cases, however, where this is not the case.

Finally, Section 309(j) seeks to balance a number of goals, some of which might, at any given time, be in slight tension. Thus, even if DE licensing takes a bit longer than non-DE licensing, this fact alone is not sufficient to justify the wholesale abdication of the Commission's responsibility under the statute to disseminate its broadband PCS licenses to a wide array of interests, and not just to well-financed incumbents.

This analysis reveals that T-Mobile's filing adds nothing new to the debate. For this reason, T-Mobile, like Verizon Wireless and CTIA itself, has not established a need to initiate a petition for rulemaking.

20/ Council Tree at 19, n.39.

II. THE COMMISSION MUST DISMISS THE PETITION FOR RECONSIDERATION FILED BY VERIZON WIRELESS

Council Tree is also surprised by Verizon Wireless's action to append a petition for reconsideration, dated July 19, 2004, to its comments in support of the CTIA Petition. 21/ In its petition, Verizon Wireless complains that it is "aggrieved by" the *Auction No. 58 Public Notice*, 22/ and falsely describes the document as "the first notice" of the application of the current auction eligibility rules. 23/ Thus, Verizon Wireless requests that the Wireless Telecommunications Bureau reconsider the *Auction No. 58 Public Notice*, noting that its filing "provides an alternative vehicle for the relief suggested by CTIA" 24/ In reality, however, neither Verizon Wireless, nor anyone else, is aggrieved by the *Auction No. 58 Public Notice*, nor does the document constitute the first notice of the effectiveness of the DE rules.

The *Auction No. 58 Public Notice* is merely a notification that an auction has been scheduled to begin. To be sure, the document invites comment on certain auction-related procedures; however, even in this regard, the *Auction No. 58 Public*

21/ Petition for Reconsideration of Verizon Wireless, DA 04-1639 (dated July 19, 2004), located in RM-11019 ("Verizon Wireless Petition for Reconsideration"). There is no indication whether the Verizon Wireless Petition for Reconsideration was timely filed with the Commission.

22/ *Id.* at 1.

23/ *Id.*

24/ *Id.* at 2, n.3.

Notice cannot be described as a final order constituting a decision, 25/ nor does it establish or deny any rights. 26/ Moreover, there are no “fundamental public interest questions” set forth in the *Auction No. 58 Public Notice*. 27/

Indeed, the substance, public interest benefits, and effectiveness of the current DE rules were: (1) promulgated pursuant to a rulemaking proceeding in which Verizon Wireless was an active participant, (2) clearly articulated in the *Sixth Report & Order* and (3) embedded in the Commission’s rules as a result of that proceeding. 28/ The *Sixth Report & Order* subsequently became final because no party – neither Verizon Wireless nor anyone else – sought reconsideration of the decision.

Accordingly, to the extent that Verizon Wireless believes it is aggrieved by the current DE rules, it should have sought reconsideration of the *Sixth Report & Order*, which it did not. This means that the Verizon Wireless Petition for

25/ 47 C.F.R. § 1.106(a). *See also* *AT&T Corp. v. FCC*, No. 03-1035 (DC Cir. 2004) at 12 (denying an appeal where the public notice contained no agency decision).

26/ NextWave Personal Communications, Inc., *Order on Reconsideration*, 15 FCC Rcd 17500, 17505 ¶ 10 (2000) (“*NextWave Reconsideration Order*”).

27/ Verizon Wireless Petition for Reconsideration at 10.

28/ Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report & Order and Order on Reconsideration*, 15 FCC Rcd 16266 (2000); 47 C.F.R. §§ 24.229(b), 24.709(a). *See also* FCC Revises Rules For Upcoming C and F Block Auction: The Rapid Deployment of Wireless Services, *FCC News Release* (rel. Aug. 25, 2000); Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS), *Order on Reconsideration*, 16 FCC Rcd 1343, 1345 ¶ 6 (2001).

Reconsideration is almost four years too late, and thus procedurally defective. 29/
For these reasons, the Commission must dismiss the Verizon Wireless Petition for
Reconsideration. 30/

III. A BROAD CROSS SECTION OF RURAL INTERESTS OPPOSE THE CTIA PETITION

RTG, OPASTCO and the Blooston Law Firm (“BloostonLaw”) strongly oppose
CTIA’s proposal to eliminate the entrepreneur eligibility restrictions, 31/ and make
plain that preservation of the current DE rules “will provide rural carriers with a
meaningful opportunity to acquire additional spectrum[.]” 32/ RTG, OPASTCO and
BloostonLaw discuss the benefits associated with the current DE rules -- in addition
to those already on the record -- including:

29/ *NextWave Reconsideration Order*, 15 FCC Rcd 17505 ¶ 10.

30/ Moreover, Council Tree notes that the Commission’s rules provide that
petitions for reconsideration “shall be served upon parties to the proceeding.” 47
C.F.R. § 1.106(f). Of course, as noted above, the *Auction No. 58 Public Notice* is not
a proceeding, nor does it constitute the culmination of a proceeding. However, in
addition to Verizon Wireless, 21 parties commented on the *Auction No. 58 Public
Notice*, and by doing so indicated their interest in the auction. Yet, Verizon
Wireless elected not to serve its petition on any of these parties.

31/ RTG and OPASTCO at 2; BloostonLaw at 1. BloostonLaw observes that the
re-licensing of PCS spectrum in Auction No. 58 will involve larger license areas, and
that “the use of eligibility restrictions to ensure small business/rural telco
participation may be necessary [under these circumstances.]” *Id.* at 2. Therefore,
BloostonLaw asks the Commission to address CTIA’s proposal in the context of
CTIA’s waiver request, rather than “eliminat[ing] the eligibility restrictions by rule
change[.]” *Id.*

32/ RTG and OPASTCO at 2.

- promoting the rapid growth and efficient deployment of quality spectrum-based services in rural areas; 33/
- permitting true build-out of service areas -- beyond just “the service areas only along rural highways” -- to meet the “real needs” of rural consumers; 34/
- providing rural operators the future opportunity to align and negotiate fairer rates for roaming agreements for current services and future data services in nearby larger markets; 35/
- providing small businesses and rural telephone companies the equal footing to fairly compete against large, well-funded applicants; 36/ and
- supplementing the partitioning rules, which are thus far a disappointment, and the spectrum leasing rules, which may only be useful in niche situations, by adding another tool for encouraging small business and rural telco spectrum access. 37/

Although RTG, OPASTCO and BloostonLaw represent rural interests, their observations regarding the benefits of the current DE rules do not appear to be shared by RCA. Nonetheless, careful examination of the RCA comments reveals that RCA does not seek the elimination of closed licenses. Rather, RCA has asked the Commission to revise the current bidding credit tiers in a manner that would permit its members to receive bidding credits, even though many of these incumbent cellular carriers are themselves much larger than DE companies. 38/

33/ *Id.*

34/ *Id.* at 3.

35/ *Id.* at 5.

36/ BloostonLaw at 1-2.

37/ *Id.* at 3.

38/ RCA at 3-4.

Yet, RCA has presented no new factual or policy developments that would justify initiating a petition for rulemaking on this issue. Therefore, the Commission should deny RCA's request.

RCA also complains about the ability of "carefully structured" applicants to attract "resources in addition to the funds made available by controlling investors for use in bidding on licenses reserved for 'entrepreneurs.'" ^{39/} To the extent RCA seeks to improve upon the existing DE rules, RCA should support Council Tree's call for the implementation of a personal net worth limitation, just as RTG and OPASTCO have done. ^{40/} The mere need for a few selective changes to the DE rules would not require a lengthy, drawn out proceeding, and would mitigate the ongoing concentration of wireless licenses (noted above) and the concerns expressed by RCA, RTG and OPASTCO.

IV. THE OVERWHELMING NUMBER OF COMMENTING PARTIES, REPRESENTING A BREADTH OF INTERESTS, URGE THE COMMISSION TO MAINTAIN THE CURRENT DE RULES FOR AUCTION NO. 58

Consistent with the comments submitted in response to the *Auction No. 58 Public Notice*, which urged the Commission to uphold the entrepreneurs' block closed bidding, the vast majority of parties commenting here strongly oppose the CTIA Petition. It is also significant that the Commission has again received comments on this matter from a broad cross-section of interested parties (in

^{39/} RCA at 2.

^{40/} RTG and OPASTCO at 5.

addition to Council Tree and the rural carrier organizations RTG, OPASTCO and BloostonLaw discussed above), including individual DEs, 41/ DE carrier companies, 42/ investors, 43/ Alaska Native entities 44/ and from the Designated Entity Supporters (“DE Supporters”), comprised of the National Coalition of Hispanic Organizations, the NAACP and the National Urban League, among others.

In sum, the Commission has received a very positive reaction to its continued enforcement of the current DE rules for Auction No. 58, and a strong negative response to CTIA’s proposal to modify the rules yet again, by eliminating the entrepreneurs’ block closed bidding. For instance, NTCH retorts, “The petitioners argue that much of the C and F block spectrum has remained fallow because closed bidding is flawed. The fact is that any past problem resulted from the now abandoned installment financing program” 45/ Likewise, the DE Supporters state that:

The CTIA Petition does not adequately address why, in view of the Commission’s very clear guidance on eligibility for future C and F Block auctions, the Commission should disavow its previous, unqualified statements and take a dramatic step backward in its efforts to diversify participation in the wireless industry. 46/

41/ Vincent McBride and Scott Reiter.

42/ 3G PCS and NTCH.

43/ Alta Communications, Catalyst Investors and Madison Dearborn Partners, LLC.

44/ Arctic Slope Regional Corporation and Doyon, Limited.

45/ NTCH at 1.

46/ DE Supporters at 6.

In light of the strong arguments put forth by the commenting parties, representing a breadth of interests, the Commission must deny the CTIA Petition, and maintain the current DE rules for Auction No. 58, including the entrepreneurs' block closed bidding.

Conclusion. As discussed above, T-Mobile's filing adds nothing new to the debate. In addition, the Verizon Wireless Petition for Reconsideration is procedurally defective, and therefore must be dismissed. On a related matter, RCA does not expressly seek the elimination of closed bidding, and fails to make a case for the initiation of a rulemaking proceeding. To the extent that RCA is concerned about the ability of certain entities to receive DE status (and the resulting entrepreneur bidding eligibility), RCA ought to join RTG and OPASTCO in supporting Council Tree's call for the speedy implementation of a personal net worth limitation.

Finally, Council notes that the overwhelming number of parties, representing a breadth of interests, have again urged the Commission to maintain the current DE rules for Auction No. 58.

Respectfully submitted,

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